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IN THE

Supreme Court of the United States

October Term, 1943

No. 1040

MARTIN LUKSICH,

Petitioner,

vs.

DOMENIC MISETICH, JAKOV MISETICH, IVAN MISETICH and ANTON MISETICH,

Respondents,

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Martin Luksich, petitioner herein, respectfully applies to this Honorable Court for a Writ of Certiorari directed to the United States Circuit Court of Appeals, for the Ninth Circuit, requiring it to certify this cause to this court for review and correction.

This is a cause in admiralty upon an appeal recently decided by the United States Circuit Court of Appeals for the Ninth Circuit, affirming the judgment, with certain limitations [Clk. Tr. p. 271], of the United States Dis-

trict Court for the Southern District of California, Central Division, and motion to take further proof before the United States Circuit Court of Appeals, for the Ninth Circuit, and the judgment of the United States District Court for the Southern District of California, Central Division, is made final by the provisions of the Judicial Code. This petition is brought under Title 28, Section 347 of the United States Code Annotated. The petition involves important questions of Federal Law, a conflict in decisions of the United States Circuit Court of Appeals, for the Ninth Circuit, admissability of evidence upon appeal the result of a change of conditions subsequent to the trial of the action in the United States District Court, and whether Established Usage and Custom shall be considered in determining the period of employment of seamen engaged in fishing.

Summary of the Facts and Proceedings Below.

I. Martin Luksich was injured on May 2, 1941, while working as a seaman aboard the fishing vessel "Lucky Star." This vessel was owned by Domenic Misetich, Jakov Misetich, Ivan Misetich and Anton Misetich. As a direct result of his injury he had to be hospitalized and remained under treatment of the United States Public Health Service for a long period of time, still being under treatment at the time of the trial in the United States District Court. [Clk. Tr. pp. 94-95.] He received treatment from the United States Public Health Service for his injuries from May 5, 1941, to the date of the trial of this matter in the United States District Court and still had not been discharged at that date. [Clk. Tr. p. 95.] The records of the United States Public Health Service indicated that he had reached his maximum degree of recovery on June 3, 1942. At which time he still had considerable disability—thought permanent. [Clk. Tr. pp. 93-94.] However, treatments given after June 3, 1942, relieved his shoulder. [Clk. Tr. p. 102.]

II. Martin Luksich orally agreed, on April 8, 1941, with Domenic Misetich, Master, to serve as a member of the crew of the "Lucky Star," upon the share basis. [Clk. Tr. pp. 39-40]. The period of employment is undisputed, by the oral evidence, to be for the Tuna and Sardine seasons. On April 15, 1941, prior to sailing from Los Angeles Harbor, purported *Shipping Articles* were signed. However, these purported *Shipping Articles* were not signed before, nor by a Shipping Commissioner.

III. Petitioner instituted an action in the United States District Court to recover his share or lay for the Tuna and Sardine seasons, for maintenance and cure, and for

damages under the Jones Act, 46 U. S. C. A. 688, being proceeding No. 2144 R. J. [Clk. Tr. p. 3.]

IV. (a) The Honorable Judge of the District Court found that "at the time libellant sustained his injury in the service of the 'Lucky Star,' he was so employed pursuant to the terms and provisions of a written contract consisting of shipping articles duly executed as provided by the statutes of the United States, and not otherwise, . . ." [Clk. Tr. p. 219.] Luksich was given a share or lay of only the catch of Tuna. [Clk. Tr. p. 220.]

(b) Petitioner was given maintenance to June 3, 1942, the date upon which the United States Public Health Service records indicated that he had reached the maximum degree of recovery.

(c) The Honorable Judge of the United States District Court held that Luksich was not entitled to recover for damages under the Jones Act. (*Petitioner does not complain of this finding.*)

V. An appeal to the United States Circuit Court of Appeals for the Ninth Circuit was taken, being proceeding No. 10,522 of said Court. After proceedings regularly had upon said appeal, the Honorable Court, after refusing to receive additional evidence to show a change of conditions subsequent to the date of trial, and to clarify the record, sustained the judgment of the District Court in said cause. A petition for rehearing was filed by the petitioner and, thereupon, the Honorable Court amended its decision and denied the petition for rehearing. [Clk. Tr. p. 273.]

From this decision the present petition for certiorari is taken.

The Questions Involved.

(1) Are Shipping Articles null and void when they are not signed before or by a United States Shipping Commissioner, when the voyage is from a United States port to Mexican waters?

The decision in the case at bar is in direct conflict with the case of *The Lily*, 69 Fed. (2d) 898, which affirmed 4 Fed. Supp. 268. (The facts are more fully stated in the decision of the District Court.) In *The Lily* the Honorable Circuit Court of Appeals for the Ninth Circuit, held that purported *Shipping Articles*, for a voyage between the Port of Los Angeles to Mexican waters, not executed and filed in accordance with the laws relating thereto, were *null and void*. In the case at bar, the purported Shipping Articles, on their face, appear not to have been signed before or by a shipping commissioner. [Clk. Tr. p. 204.] The Honorable United States District Court and United States Circuit Court of Appeals, in the present case, accept these purported Shipping Articles as a valid contract. The two decisions are irreconcilable, and the question has not been determined by the United States Supreme Court.

If the purported Shipping Articles are *null and void*, as a matter of law, in accordance with *The Lily, supra*, there is no conflict in the evidence that appellant was employed for the Tuna and Sardine seasons, and the decision of the Honorable United States Circuit Court of Appeals for the Ninth Circuit in the case must be reversed.

(2) Is a seaman, injured in the course of his employment, which injury results in a chronic condition, entitled to maintenance and cure—or "care"—so long as medical attention and treatment relieve—temporarily—the pain resulting from the injury?

The United States Circuit Court of Appeals for the Ninth Circuit, in this case, held that recovery for maintenance and cure "should not be extended beyond the time when the maximum degree of improvement to his health is reached." [Clk. Tr. p. 270.]

The United States Circuit Court of Appeals for the Third Circuit held, in *Loverich v. Warner*, 118 Fed. (2d) 690, certiorari denied, 61 S. Ct. 1101, 313 U. S. 577, 85 L. Ed. 1535, that a seaman could recover maintenance and cure—after the maximum degree of recovery had been reached. This was a case wherein a seaman suffered from cancer of the throat, and wherein the treatments merely temporarily relieved his condition. This question is of great importance and has not been determined by the United States Supreme Court, and decision upon it was expressly reserved in *Calmar S. S. Co. v. Taylor*, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993.

(3) When, affidavit of doctor, showing a recovery from injury and disability, plus a stipulation by proctors before the Honorable Circuit Court of Appeals that recovery complete about three months after trial, is before the United States Circuit Court, does this constitute a change in condition subsequent to trial in the United States District Court and prior to

the filing of an appeal, which will require the admission of this evidence on the appeal, which was a trial de novo?

Counsel for petitioner and respondents stipulated before the Honorable United States Circuit Court of Appeals for the Ninth Circuit, that on April 16, 1943, appellant had fully recovered from his injuries. In addition to this stipulation, the affidavit of Dr. Jack Yonchar, who was one of petitioner's United States Public Health Service's attending surgeons, when petitioner was admitted to the hospital on May 5, 1941, stated that petitioner had, on October 30, 1943, none of the disability noted in the records of the United States Public Health Service on June 3, 1942. [Clk. Tr. p. 259, 260.] This directly indicated that the doctor from the United States Public Health Service, who testified at the trial, did not know, at that time, the true prognosis of petitioner's condition. Subsequent improvement indicated the error in the position of the United States Public Health Service, at the time of trial.

(4) Did the affidavit of the master of the "Lucky Star" stating "I hired Martin Luksich for both tuna and sardine seasons and had him work on tarring of the sardine net which was used in the sardine season," constitute sufficient basis upon which petitioner was entitled to take additional evidence before the Honorable Circuit Court of Appeals upon the question of the term of petitioner's employment?

The oral evidence before the United States District Court is not in dispute that petitioner was employed for

both the tuna and sardine seasons. However, the Honorable United States District Court held that the *written shipping articles* were controlling. The Honorable United States Circuit Court of Appeals held, that the *written shipping articles* did not "embody all the basic provisions of the employment (duration of contract and compensation) and consequently must be supplemented by additional terms to constitute a complete agreement." Petitioner urges that they were then required to take additional testimony of the Master of the "Lucky Star," in view of his affidavit asserting the period for which petitioner was employed. The Circuit Court of Appeals has taken an opposite view.

(5) Should established custom and usage be considered in determining the period of the contract of employment of a fisherman who is engaged in fishing tuna and sardines on the Pacific Coast?

There is no dispute in the evidence that there was a custom to hire fishermen for both tuna and sardine seasons. [Clk. Tr. pp. 166-168, 193-194.]

The Honorable Judge of the United States District Court stated that the matter of employment was covered solely by the shipping articles, the Honorable Circuit Court of Appeals stated that parol evidence was admissible along with the shipping articles, but failed to give any cognizance to the established custom and usage.

The Importance of the Questions and Reasons Why Certiorari Should be Granted.

Apart from the importance of the case to the parties immediately affected thereby, this cause presents issues of large general and public interest:

(1) It is of great importance to now determine whether purported *Shipping Articles* from Southern California ports to Mexican waters can be *"null and void"* for certain purposes and yet a *valid* contract for other purposes. There are a great number of tuna clippers making voyages from Southern California ports to Mexican waters and a clarification of the effect of these purported "shipping articles" is necessary. As the contract of employment of all fishermen in Southern California, who fish for tuna and sardines, is directly involved, much confusion and uncertainty will exist until this question is settled by this Court.

(2) In the proceeding below, both courts took the view that a seaman, who contracted a chronic condition from injuries, which was disabling, though the pain caused by this condition could be relieved by treatment, was no longer entitled to maintenance and cure when he had reached the maximum degree of recovery. Both courts below took the position that petitioner had reached the maximum degree of recovery although treatments gave him relief from pain and directed to a condition that was disabling. In this Supreme Court in *Calmar S. S. Co. v. Taylor, supra,* this question was not decided, but the Court

stated with reference to a condition that merely arose during the period of the seaman's employment:

> "There remain the questions whether in the case of a chronic illness the duty continues so long as medical attendance and care are beneficial, until death if the need last so long, and whether a lump sum may be awarded to defray the cost of the anticipated need.
>
> "In answering the first we lay to one side those cases where the incapacity is caused by the employment, as to them considerations not present here may apply, which might be thought to require a more liberal application of the rule than we think is called for in this case."

Petitioner urges that this question is of vital importance to all American seamen, and in view of the vast increase of merchant marine personnel, this question should be determined by this Court, especially because the present decision does not follow that of *Loverich v. Warner, supra,* and there now is a direct conflict in decisions of the Ninth and the Third Circuits, in spite of the fact that the Circuit Court of Appeals below, cited *Loverich v. Warner, supra,* in support of their decision.

(3) The general principal of law as set forth in the decision of the Circuit Court of Appeals, below, as to the Admission of New and Further Evidence, is a correct annunciation thereof. However, petitioner urges that with the change of the applicability of the purported "Shipping Articles," the Circuit Court of Appeals was required to take the additional testimony of the Master of the "Lucky Star." While petitioner claims that the further evidence of the Master should have been taken, the Circuit Court of Appeals took an opposite view.

The same position was taken by the Circuit Court of Appeals with reference to the taking of further testimony showing a change of conditions subsequent to the trial, which could have been demonstrated by a doctor previously with the United States Public Health Service, and who was one of petitioner's attending physicians at the time he was admitted to the hospital.

(4) The Circuit Court of Appeals failed to recognize or give any weight to the established custom to employ fishermen for both the tuna and sardine seasons. It has been established by this Court in *Robinson v. United States,* 80 U. S. 363, 13 Wall. 363, 20 L. Ed. 653, that,

> "Parties to a contract on a subject matter concerning which known usages prevail, by implication incorporate then into their agreements, if nothing is said to the contrary."

The extent of the applicability of the custom in the case involves a question of great importance to thousands of workers in an extensive American industry.

Wherefore, your petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to send to this Court for its review and adjudication the record and proceedings in this cause recently in the United States Circuit Court of Appeals.

Dated: San Pedro, California, April 17, 1944.

Respectfully submitted,

DAVID A. FALL,

Proctor for Petitioner.